FILE COPY

Office Supreme Court, U.
FILED
DEC 16 1935
CHARLES ELMORE CROP
CLERK

In the

Supreme Court of the United States

October Term, 1935.

No. 252.

INTERNATIONAL STEEL AND IRON COMPANY,
Appellant,

vs.

NATIONAL SURETY COMPANY,
Appellee.

REPLY BRIEF ON BEHALF OF INTERNATIONAL STEEL AND IRON COMPANY, APPELLANT.

ISIDOR KAHN,
LOUIS LEFTWICH,
CECIL SIMS,
Counsel for Appellant.

F. M. BASS,
Of Counsel.

BAIRD-WARD—NASHVILLE

SUBJECT INDEX

(1) Jurisdiction 3

(2) This Court Will not Consider a non-Federal Question Unless it Was Expressly Adjudicated by the Supreme Court of Tennessee 5

(3) Appellee's Contention with Reference to Waiver and Estoppel is Wholly without Merit 8

Both Sureties Sued, Construing Statute as Cumulative 9

Appellee Not Prejudiced but Received Distinct Advantage 10

Narrative Reference to Statute Does not Amount to Suit to Enforce Statute 11

Refunding Bond Enforceable Irrespective of Constitutionality of Statute 13

CONCLUSION 15

Table of Cases

Fidelity & Guaranty Co. vs. Rainey, 120 Tenn., 357 14

Grayson vs. Harris, 267 U. S., 352 ..... 7, 8

Great Northern Railway Co. vs. Sunburst Oil & Refining Co., 287 U. S., 358 4

Lake Charles Planing Mill Company vs. Grand Lodge (La.), 53 Southern, 550 13

Love vs. McCoy (W. Va.), 94 S. E., 954 13

Murdock vs. The Mayor and Aldermen of Memphis, 20 Wallace, 590 6

Murrell vs. Watson, 2 Shannon's Cases (Tenn.), 244 10

Saunders vs. Shaw, 244 U. S., 317 3

Tate vs. Tate, 126 Tenn., 212 10

Verhine vs. Ragsdale, 96 Tenn., 532 10

34 Corpus Juris, Sec., 1227 10

In the

Supreme Court of the United States

October Term, 1935.

No. 252.

INTERNATIONAL STEEL AND IRON COMPANY,
Appellant,

vs.

NATIONAL SURETY COMPANY,
Appellee.

REPLY BRIEF ON BEHALF OF INTERNATIONAL STEEL AND IRON COMPANY, APPELLANT.

May It Please the Court:

Since the filing of the brief on behalf of appellant the appellee has filed a brief which raises and discusses a question not presented in appellant's brief and which could not have been presented at the time it was filed. We, therefore, deem it important to make brief reply to this new contention now advanced by appellee.

Appellee contends that the only question before the Supreme Court of Tennessee at the time it decided the present case was the proper interpretation of Chapter 80 of the 1929 Public Acts of Tennessee. It is said that the appellee's contention was that this statute should be construed to ef-

fect a release of appellee's bond as contract surety in the event of the execution of a refunding bond and it is pointed out that appellant disputed this interpretation and contended that the statute should not be construed so as to effect such a release of appellee's bond. Appellee says:

> "This was the issue in the Supreme Court, one solely of interpretation. The contract clause was not invoked in the assignments. There was no constitutional question."
>
> Appellee's Brief, p. 6.

Appellee further points out the fact that appellant included among the defendants the surety on the refunding bond taken by the Highway Commissioner while acting pursuant to the provisions of Chapter 80 of the 1929 Public Acts of Tennessee, and that judgment was rendered in favor of appellant against one of these sureties at the same time that judgment was rendered against appellee, and it is said that by reason of these facts appellant waived any right to subsequently insist upon the unconstitutionality of the statute *irrespective of the effect of any subsequent interpretation of the act*, and further that this Court has no jurisdiction to review the decision of the Supreme Court of Tennessee where the only question before that court was one of the proper interpretation of a state statute, and that the decision of the Supreme Court of Tennessee on the question of interpretation was final.

When properly analyzed, appellee's contentions resolve themselves into the following questions:

(1) Whether or not appellant raised the constitutional question properly and in sufficient time to give this Court jurisdiction on appeal;

(2) Whether or not the non-federal question of waiver and estoppel can be raised by appellee in this Court and whether it can be considered in this Court in the absence of an adjudication of the question in the opinion of the Supreme Court of Tennessee;

(3) In the event of consideration of the non-federal question of waiver or estoppel, whether or not there is any merit in the contention.

These questions will be presented in the order stated.

(1) *Jurisdiction.*

This case was considered by three State courts, the Chancery Court, the Court of Appeals and the Supreme Court of Tennessee. Neither the Chancery Court nor the Court of Appeals gave any interpretation to the statute which violated appellant's constitutional rights. The Chancery Court construed the statute as merely providing a cumulative or additional right, and as not releasing or abrogating the contract of the original surety (appellee). (Rec., 38.)

The Court of Appeals construed the statute as prospective only and as not retroactive and, therefore, inapplicable to the controversy. (Rec., 61.)

The Supreme Court of Tennessee, for the first time, at the end of the litigation construed the statute to be both retroactive by its terms and to effect a cancellation and release of the original contract surety's obligation and thereby supplied a new and unexpected basis for the claim of the denial of the federal right. Since the denial of the federal right arose out of the interpretation of the statute by the Supreme Court of Tennessee at the conclusion of the litigation, the first time appellant could assert its right was by appeal to this Court with appropriate assignments of error, which was done. (Rec., 11.)

Jurisdiction of this Court on appeal under these circumstances comes well within the law as laid down by this Court in *Saunders* v. *Shaw*, 244 U. S., 317, and *Great Northern Railway Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S., 358, from which we quote, as follows:

> "The question remains whether the writ of error can be maintained. The record discloses the facts but does

not disclose the claim of right under the 14th Amendment until the assignment of errors filed the day before the chief justice of the state granted this writ. Of course ordinarily that would not be enough. But when the act complained of is the act of the Supreme Court, done unexpectedly at the end of the proceeding, when the plaintiff in error no longer had any right to add to the record, it would leave a serious gap in the remedy for infraction of constitutional rights if the party aggrieved in such a way could not come here. The defendant was not bound to contemplate a decision of the case before his evidence was heard, and therefore was not bound to ask a ruling or to take other precautaions in advance."

Saunders v. *Shaw*, 244 U. S., at p. 320.

"We have then in the record what is in essence the stipulation of counsel followed by the acquiescence of the court. Whether this without more avoids the application of the general rule that a constitutional question is urged too late if put forward for the first time upon a petition for rehearing (*American Surety Co.* v. *Baldwin*, 287 U. S., 156, *ante*, 231, 53 S. Ct., 98; *Godchaux Co.* v. *Estopinal*, 251 U. S., 179, 64 L. Ed., 213, 40 S. Ct., 116), we are not required to determine, for here there is more, and that enough to bring the case within a well-recognized exception. The rule, general as it is, does not extend to cases where the constitutional question, however tardily raised, is considered and decided (*Consolidated Turnp. Co.* v. *Norfolk & O. V. R. Co.*, 228 U. S., 326, 334, 57 L. Ed., 857, 862, 33 S. Ct., 510; *Cumberland Coal Co.* v. *Board of Revision*, 284 U. S., 23, 76 L. Ed., 146, 52 S. Ct., 48), nor does it apply where the grounds of the decision supply a new and unexpected basis for a claim by the defeated party of the denial of a Federal right. *Brinkerhoff-Faris Trust & Sav. Co.* v. *Hill*, 281 U. S., 673, 678, 74 L. Ed., 1107, 1112, 50 S. Ct., 451; *Missouri, ex rel. Missouri Ins. Co.* v. *Gehner*, 281 U. S., 313, 320, 74

L. Ed., 870, 875, 50 S. Ct., 326; *American Surety Co.* v. *Baldwin*, 287 U. S., 156, *ante*, 231, 53 S. Ct., 98, *supra*."

Great Northern Railway Co. v. *Sunburst Oil & Refining Co.*, 287 U. S., at pp. 366-367.

As in the case last quoted from, apparently appellee concedes in the present case that the constitutionality of the statute (if interpreted adversely to appellant's contention), was briefed and argued before the Supreme Court of Tennessee. (Appellee's brief, p. 6.) At all events, it was expressly passed upon by the Supreme Court of Tennessee. Whether the case comes under the general rule or under the exception, the question was raised and passed on and is now before this Court on proper assignments of error.

(2) *This Court Will not Consider a non-Federal Question Unless it Was Expressly Adjudicated by the Supreme Court of Tennessee.*

The contention of appellee that appellant is estopped because it sought to enforce the obligations of the refunding bond jointly in the suit against appellee upon the theory that appellant thereby waived the unconstitutionality of the provisions of Chapter 80 of the 1929 Public Acts of Tennessee growing out of its final interpretation by the Supreme Court of Tennessee, is purely a *non-federal question*. This question was not raised by appellee in the State courts in any pleading or assignment of error and it was not adjudicated by the Supreme Court of Tennessee. Irrespective of the validity or invalidity of such insistence, it is clear that this Court cannot consider it in connection with the present appeal for the reason that it was not passed upon or adjudicated by the Supreme Court of Tennessee.

This precise question arose in *Murdock* v. *The Mayor and Aldermen of Memphis*, 20 Wallace, 590, and this Court held that it could not consider a non-federal question which had been ignored and not expressly adjudicated by the Supreme

Court of the State. We quote from the opinion, as follows:

> "But when we find that the State Court has decided the federal question erroneously, then to prevent a useless and profitless reversal, which can do the plaintiff in error no good, and can only embarrass and delay the defendant, we must so far look into the remainder of the record as to see whether the decision of the federal question alone is sufficient to dispose of the case, or to require its reversal, or on the other hand, whether there exist other matters in the record *actually decided by the State Court* which are sufficient to maintain the judgment of that court, notwithstanding the error in deciding the federal question. In the latter case the court would not be justified in reversing the judgment of the State Court.
>
> "But this examination into the points in the record other than the federal question is not for the purpose of determining whether they were correctly or erroneously decided, but to ascertain *if any such have been decided,* and their sufficiency to maintain the final judgment, *as decided by the State Court.*
>
> "Beyond this we are not at liberty to go, and we can only go this far to prevent the injustice of reversing a judgment which must in the end be re-affirmed, even in this court, if brought here again from the State Court after it has corrected its error in the matter of federal law."
>
> *Murdock* v. *The Mayor, etc,* 20 Wallace, at p. 635.

Thereupon this Court laid down seven general propositions of law which clearly define the circumstances under which the Court would give consideration to a non-federal question, two of which propositions are directly applicable to the present controversy and we, therefore, quote, as follows:

> "6. If it was erroneously decided against plaintiff in error, then this court must further inquire, whether

there is any other matter or issue *adjudged by the State Court,* which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the federal question. If this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue.

"7. But if it be found that the issue raised by the question of federal law is of such controlling character that its correct decision is necessary to any final judgment in the case, *or that there has been no decision by the State Court of any other matter or issue which is sufficient to maintain the judgment of that court without regard to the federal question,* then this court will reverse the judgment of the State Court, and will either render such judgment here as the State Court should have rendered, or remand the case to that court, as the circumstances of the case may require."

Murdock v. *The Mayor, etc.,* 20 Wallace, at p. 636.

Illustrative of this principle is the recent decision of this Court in *Grayson* v. *Harris,* 267 U. S., 352. In that case the suit arose in the State court of Oklahoma and the case came to this Court on writs of error and *certiorari* to the Supreme Court of Oklahoma to review its final decree. In this Court the defendants in error relied upon two defenses which were stated by Mr. Justice Sutherland as follows:

"On behalf of defendants in error, it is asserted: (1) That there was an entire absence of proof that plaintiffs in error are citizens of the Creek Nation and we are asked to review the record in that respect in order to determine whether there was any basis for the claim of Federal right; and (2) that an examination of the record will show that the plea of the Statute of Limitations was fully established, and, therefore, the decision of the State Supreme Court reasonably may be affirmed on that non-Federal ground."

Grayson v. *Harris,* 267 U. S., at p. 358.

It will be seen that the plea of the Statute of Limitations was a non-federal defense, and it was disposed of by this Court in the following language:

> "Nor need we inquire into the defense of the Statute of Limitations. The decision now under review entirely ignores it. The rule that, when the decision of a state court may rest upon a non-Federal ground adequate to support it, this court will not take jurisdiction to determine the Federal question, has no application where, as here, the non-Federal ground might have been considered by the state court, but was not. *Rogers* v. *Hennepin County,* 240 U. S., 184, 188, 189, 60 L. Ed., 594, 597, 598, 36 Sup. Ct. Rep., 265; *Henderson Bridge Co.* v. *Henderson City,* 173 U. S., 582, 608, 43 L. Ed., 823, 829, 19 Sup. Ct. Rep., 553."
>
> *Grayson* v. *Harris,* 267 U. S., at p. 358.

In the present case the non-federal question of waiver or estoppel was not adjudicated by the Supreme Court of Tennessee but was entirely ignored. Apparently it was not considered by the State Supreme Court, but if it was considered it is to be presumed that this non-federal question was decided against appellee. The opinion of the Supreme Court of Tennessee rests solely upon the federal question and there being no adjudication of any other non-federal questions adequate to sustain the judgment the only question before this Court is the correctness of the decision of the Supreme Court of Tennessee with respect to the federal question.

(3) *Appellee's Contention with Reference to Waiver and Estoppel is Wholly without Merit.*

Wholly aside from the foregoing propositions of law, the contention advanced by the appellee is without merit, for the following several reasons:

1. Appellant sued *both* the Contract Surety and the Refunding Surety, construing Chapter 80 of the Acts of 1929

to afford merely an additional surety without releasing the Contract Surety. A suit under an Act, not previously construed, upon a reasonable interpretation would not estop appellant from attacking the constitutionality of the Act where the opposing party, after the suit was brought, insisted upon a wholly different *construction* of the Act, which was not sustained except in the final decision of the Supreme Court of Tennessee.

2. The Appellee was in no manner prejudiced by the suit against both it and Refunding Surety. On the other hand, such a suit, particularly in the absence of previous judicial construction of the Statute, was manifestly for its benefit.

3. Appellant did not sue to obtain the benefits of a Statute. It sued to recover on a bond that was taken pursuant to the Statute. A mere narrative recital that the bond was taken pursuant to the law, which was true irrespective of the constitutionality of the law, does not bring the case within the estoppel rule.

4. Appellant was entitled to sue upon the refunding bond irrespective of the constitutionality of the Statute. If the Statute was unconstitutional the bond was valid and enforceable as a common law obligation. A suit on the refunding bond neither affirms nor disaffirms the constitutionality of the Statute.

These questions will be dealt with in the order above set out.

Both Sureties Sued, Construing Statute as Cumulative.

The question of the constitutionality of the Statute does not arise upon the theory of Appellant's suit. Appellant sued both the Contract Surety and the Refunding Surety, construing the Statute to provide an additional or cumulative right. There had been no previous judicial interpre-

tation of the Statute to the contrary, and the construction of the appellant was *reasonable* and *tenable*.

After this suit was brought Appellee in its answer insisted upon a wholly different and contradictory construction of the Statute. As construed by Appellant (providing an additional right without releasing the original surety) the statute had no constitutional objection. The theory of estoppel is based upon a litigant assuming repugnant or contradictory positions. Appellant's position, under its construction of the Statute, is neither repugnant nor contradictory to its constitutionality. *A mistaken theory as to the law does not work an estoppel.*

Verhine v. *Ragsdale*, 96 Tenn., 532.

Murrell v. *Watson*, 2 Shannon's Cases (Tenn.), 244.

Tate v. *Tate*, 126 Tenn., 212.

"Where a plaintiff is defeated in an action based upon a certain theory of his legal rights or as to the legal effects of a given transaction or state of facts through failure to substantiate his views of the case, this will not as a rule preclude him from renewing the litigation, without any change in the facts, but basing his claim on a new and more correct theory. This rule applies. . . . Where an unsuccessful attempt to enforce a liability under a statute is followed by an action to hold the same defendant liable on the same facts as at common law or vice versa. . . ."

34 Corpus Juris, Sec. 1227.

Appellee Not Prejudiced but Received Distinct Advantage.

The elementary principle underlying estoppel is *prejudice* or *disadvantage*. Estoppels are odious, and appellant can not be foreclosed unless appellee has been misled by the bringing of the suit to its detriment.

What disadvantage accrued to appellee because appellant sought a judgment against both it and the Refunding

Surety? If appellant was allowed to recover against both then any sums collected from the Refunding Surety would be applied in reduction of the appellee's obligation. If appellee was made to pay the entire judgment, it would be subrogated to appellant's judgment against the Refunding Surety. Under no aspect of the case could the joining of a Refunding Surety as a party defendant, and the seeking of a judgment against it, have resulted to the appellee's disadvantage. The appellee has not only failed to show detriment or disadvantage, which is essential to invoke estoppel, but as will appear later it actually invoked the process of the Court to retain the advantage of a judgment against the Refunding Surety. Thus there was neither inconsistency, repugnancy, nor detriment—all *essential elements of estoppel.*

Narrative Reference to Statute Does Not Amount to Suit to Enforce Statute.

The allegation in appellant's original bill, upon which the appellee now relies as an estoppel, was a mere historical reference to the fact that the refunding bond was taken *"as provided by law."* This phrase was used in connection with the purely historical narrative in chronological order of the various steps taken prior to the institution of the suit. The phrase was wholly incidental and referred merely to the fact that the refunding bond was taken in accordance with the provisions contained in Chapter 80 of the Acts of 1929, *and so it was.* The suit was not to enforce a statutory liability, but to enforce the *contract obligation* of the refunding bond.

Appellee points out the fact that appellant asked to amend its bill so as to require the Commissioner to pay the retainage into court. (Appellee's Brief, p. 8.) This amendment was disallowed by the Chancellor upon the ground that it was inconsistent with the original bill, which sought a recovery on the refunding bond. (R., 36, 37.)

While this is relatively unimportant it is proper to clarify this situation. At the hearing appellant sought to amend its original bill so as to require the Commissioner of Highways to pay the retainage into court. (R., 36.) The theory of this amendment was to call upon the Commissioner to enforce the refunding bond, that is, to demand and recover the retainage back and then to pay it into court. The Chancellor in his written opinion at the beginning denied the amendment on the theory that it was inconsistent with the original bill. (R., 37.) However, the Chancellor in the concluding portion of the opinion in effect granted the relief suggested by the amendment and ordered the Commissioner to demand the return of the retainage, and if necessary, collect on the refunding bond, and pay the money into court to be credited on the judgment. (R., 42.) The Chancellor, in his original decree, granted no judgment against the refunding surety.

Thereupon appellee filed a petition to rehear, alleging that *it was aggrieved* by the failure of the Chancellor to render a judgment against the Refunding Surety. (R., 57.)

At the instance of the appellee the former decree was in part set aside and a judgment was rendered against the Refunding Surety. (R., 43, 44.)

It thus appears from the record that while the appellant in reciting the history of the transactions referred to the refunding bond as having been taken under the Statute, and sought a judgment against both the Contract Surety and the Refunding Surety, no objection was raised by the appellant when the Chancellor granted a judgment against the contractor and the appellee, and instructed the Commissioner to enforce the refunding bond and pay the money into court, and thereupon appellee took the position that it was aggrieved because the Chancellor had not granted a judgment on the refunding bond, and *insisted* and *demanded* and *procured* a judgment in the cause against the Refunding Surety. It is difficult to see how appellee can urge the fact of this judgment as an estoppel against

the appellant, and we submit the contention is without merit.

Refunding Bond Enforceable Irrespective of Constitutionality of Statute.

It is submitted that the mere Act of bringing suit on the refunding bond under the facts of this case has no bearing upon the constitutionality or the unconstitutionality of the Statute under which it was taken. Appellant was entitled to sue on the undertaking irrespective of the constitutionality of the Statute. The refunding bond was based upon a valuable consideration, was voluntary in character and was a binding obligation for the benefit of the appellant, even if Chapter 80 of the Acts of 1929 was inapplicable or unconstitutional. This exact question arose and was decided in *Lake Charles Planing Mill Company* v. *Grand Lodge* (La.), 53 Southern, 550, from which opinion we quote as follows:

> "The exception of no cause of action was properly overruled, as it was expressly stipulated that all furnishers of material should have an individual right of action on the bond to insure the collection of their claims. *The recital in the bond that the same was given in accordance with Act No. 180 of 1894 does not prevent the instrument from being valid against the surety as a conventional bond to secure workmen and furnishers of supplies.*"

Further illustrative of this principle of law is the case of *Love* v. *McCoy* (W. Va.), 94 S. E., 954, from which we quote as follows:

> "The controversy requires the determination of a single inquiry, namely, whether a bond voluntarily executed, in conformity with the requirement of a statute subsequently adjudged to be invalid as in contravention of the fundamental or organic law, can serve as the basis of an action to recover damages for the breach of the obligation. As a further limitation

upon the scope and extent of the inquiry, it may be said that its solution depends not wholly upon the constitutional incompetency of the act, for, though it thereafter be declared void, the discharge of the obligors from liability does not necessarily follow as a matter of course. While the failure of an act to stand the test of constitutionality does frequently render invalid a bond given pursuant to its requirements, and relieve the obligors from the liability it would impose if the statute were not void, yet if there be some consideration underlying it independent of the statute, or there accrues to them some benefit, advantage, or profit by its execution, they will be required to respond to the undertaking expressed in the instrument. It is not the policy of the law to permit escape from the legal consequences of the execution of such an instrument, if some one or more of the persons who bind themselves to perform its conditions receive and enjoy its fruits or the protection it affords, or derive some material or financial benefit from it. They will not, in either such event, when summoned to account for a breach of the conditions, be permitted to plead the voidness of the statute necessitating the execution of the undertaking."

The principle underlying the above decisions was adopted and approved by the Supreme Court of Tennessee in *Fidelity & Guaranty Company* v. *Rainey*, 120 Tenn., 357, in which case the bond, while purporting to be executed pursuant to the Statute, contained obligations not required by the Statute. After approving the principle above stated, and disapproving certain cases to the contrary, the Court concluded as follows:

> "The bond executed by Rainey was voluntarily executed, upon sufficient consideration, and is clearly enforceable as a common law bond to the full amount of the penalty described."
>
> *Fidelity & Guaranty Co.* v. *Rainey*, 120 Tenn., at p. 399.

If appellant was entitled to sue on the bond irrespective of the constitutionality of the Statute under which it was given, then a suit on the bond stating that it was given under the Statute could not be construed as either an affirmance or disaffirmance of the constitutionality of the Statute, and hence could not be the basis of an estoppel to subsequently question the constitutionality of the Statute under the facts of this case.

CONCLUSION.

It will be seen from the record that appellee's principal is indebted to appellant in a very large sum of money ($58,593.71), which represents materials and labor furnished in the construction of a bridge in express reliance on the contractual obligation of appellee. In appellee's brief a statement is inadvertently made in several places that the refunding surety has paid $40,000.00 into court, which has been received by appellant. (Appellee's brief, pp. 1, 2, 5.) It is true that a judgment was rendered against the refunding surety in the sum of $40,000.00 and this amount was ordered paid into court to be applied as a credit on the judgment rendered against appellee and its principal. There is no basis, however, for the statement that it has ever been paid into court and we feel sure that such insistence will not be made by appellee's counsel, as this statement is an inadvertence. This statement is made simply for the purpose of correcting a manifest inadvertence and without any reflection upon counsel for appellee. Even if the $40,000.00 had been paid into court, appellee's obligation would remain unsatisfied to the extent of $18,593.71 and the legal question presented would be the same.

On pages 10-11 of appellee's brief, counsel has manifestly misconstrued a statement contained in appellant's original brief. Appellee leaves the impression that an argumentative statement assuming a certain interpretation of Chapter 80 of the 1929 Public Acts of Tennessee for the purpose of demonstrating the violation of appellant's constitutional

rights was in effect a concession of such an interpretation throughout the entire litigation. The final interpretation as announced by the Supreme Court of Tennessee is binding and controlling on this appeal and appellant and appellee must now necessarily concede the binding effect of such an interpretation. Conceding this to be true, (i. e. upon such an assumption) appellant contends the act is violative of its constitutional rights.

Respectfully submitted,

ISIDOR KAHN,
LOUIS LEFTWICH,
CECIL SIMS,
Counsel for Appellant.

F. M. BASS,
Of Counsel.

NOTE: All italics in quotations are by counsel.